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Br. of Cheyney & Lewis for Opp.
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JAMES H. MCKENNEY,

IN THE

Supreme Court of the United States.

Filed Feb 26th, 1900.

FARR & BAILEY MANUFACTURING COMPANY,
Appellees,

v.

THE INTERNATIONAL NAVIGATION COMPANY,
Appellants.

In re Petition for Writ of Certiorari.

Brief in Opposition to Petition.

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22514

IN THE

Supreme Court of the United States.

FARR AND BAILEY MANUFACTURING COMPANY,
Appellees,

v.

INTERNATIONAL NAVIGATION COMPANY,
Appellant.

In the Matter of the Petition of the International Navigation Company for a writ of certiorari, directed to the Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF THE FARR AND BAILEY MANUFACTURING COMPANY, IN OPPOSITION TO THE PETITION.

This suit was brought to recover damages for injury to certain bales of burlaps while being carried on the steamship "Indiana" from Liverpool to Philadelphia.

The damage was caused by sea water entering through a port, which was found to be open, four or five days after the departure of the ship from Liverpool.

The learned judge of the District Court found as a fact "that the port in question was *either not fastened at all, or was insecurely fastened, when the vessel left Liverpool.*"

It is said in the opinion of the Court of Appeals, by DALLAS, J.:

"The impression made upon us by the evidence is that it was probably closed, but, be this as it may, certain it is that it was not securely fastened."

There is no foundation, therefore, to sustain the allegation in the seventh paragraph of the petition, that the District Court and the Court of Appeals found as a fact that the port, "although not open so that water could be admitted at the time of sailing, was insufficiently and insecurely fastened, and afterwards was worked open by the action of the sea."

Nor does the evidence warrant the allegation (page 3 of petitioners' brief) "that the port, although insufficiently fastened and although able to resist the force of the sea for four or five days, eventually worked open and admitted the water."

The evidence only shows that water was discovered in the hold at the end of four or five days, and that the port was then wide open.

Whether it was *open* at the time of sailing, was not shown, nor did it have any material bearing upon the question of the case, *i. e.*, whether the "Indiana" was unseaworthy in sailing from Liverpool with a port of a cargo hold, at least so insecurely fastened as not to prevent the influx of water.

The learned judge of the District Court held, in the first instance, that whether the port covers were not fastened at all, or were insecurely fastened, was immaterial; that in either event the ship was not seaworthy.

After a reargument, the learned judge reiterated his opinion that the vessel was actually unseaworthy, but deemed the facts in the case of the "Silvia," 171

U. S., 462, so similar as to be a binding authority upon the question of seaworthiness in this case, and bowing to what he understood to be the decision of this court, reversed his former finding and held that the vessel was not unseaworthy.

This court did not, in the "Silvia" case, pronounce any general rule of law as to seaworthiness, but held that the finding of the District Court and Circuit Court of Appeals of the seaworthiness of the vessel was correct, under the circumstances which the case presented.

After the appeal, counsel for the libellant had the opportunity of examining the record in the case of the "Silvia" and prepared and submitted to the Court of Appeals an analysis and comparison of the testimony in the two cases.

The majority of the Court of Appeals, having the assistance of this comparison of testimony, which the District Court lacked, came to the conclusion that there was such a wide difference between the facts of the cases, as to prevent the decision in the "Silvia" case from being binding in this case. The majority of the Court held that the "Indiana" was not in fact, seaworthy, thereby affirming the real opinion of the District Court. While in the dissenting opinion of Judge GRAY, it is said that the case of the "Silvia" is a binding one, yet the main ground of dissent appears to be that the owner complied with the provisions of the Harter Act by furnishing a ship not defective in structure or equipment, a point which will be referred to later.

Without burdening the court upon this preliminary application with the detailed comparison of the facts of these two cases, which was presented

to the Court of Appeals, the following summary will show such a wide difference in the two cases, as to fully warrant the conclusion of the Circuit Court of Appeals.

The facts in the case of the "Silvia" were as follows:

The "Silvia," with sugar in her lower hold, sailed from Matanzas for Philadelphia on the morning of February 16, 1894. The compartment between decks, next the forecastle, had been fitted up to carry steerage passengers, but on this voyage contained only spare sails and ropes, and a small quantity of stores. This compartment had four round ports on each side, which were about eight or nine feet above the water line when the vessel was deep laden. Each port was eight inches in diameter, furnished with a cover of glass five-eighths of an inch thick set in a brass frame, as well as with an inner cover or dummy of iron. When the ship sailed, the weather was fair, and the glass covers were tightly closed, but the iron covers were left open in order to light the compartment, should it become necessary to get anything from it, and the hatches were battened down, but could have been opened in two minutes by knocking out the wedges. In the afternoon of the day of sailing, the ship encountered rough weather, and the glass cover of one of the ports was broken—whether by the force of the seas or by floating timber or wreckage, was wholly a matter of conjecture—and the water came in through the port and damaged the sugar.

In the case of the "Indiana" the facts are as follows:

The compartment in which the burlaps were

carried was occasionally used for the carriage of steerage passengers, being known as No. 3, lower steerage, but on the voyage in question was used as a cargo compartment exclusively, containing the burlaps of the appellants and some other cargo. The port in question was eight or nine inches in diameter, furnished with a cover of glass set in a brass frame, as well as an inner cover, or dummy, of iron.

Both the iron and the glass covers were intended to be closed before the loading of any cargo. The second and third officers and the carpenter all testified that it was their respective duties, either to close both the glass and iron covers, or to see that they were closed, before any cargo was received, and that they were to be kept properly closed and fastened during the reception of the cargo and at the beginning of and during the voyage (Dixon, p. 86; Forbes, p. 51; Miller, 33). All of these officers were under the mistaken impression that both port covers were properly closed at the time the loading of the cargo was completed, and the hatches were battened down, with the officers under that impression, and with no intention on the part of any one to give any further attention to the port covers during the voyage.

The port in question was only two or three feet above the water line (Dixon, p. 88) and a very slight roll of the ship, in a moderate sea, was sufficient to submerge it and to permit the influx of water (Shackford, p. 65). A few days after the commencement of the voyage, and without any unusual weather having been experienced, the soundings indicated a leak, the hatches of this compartment were unbattened

and it was found that the port was open and that a large amount of water had been admitted to the compartment.

It will be seen, by a comparison of the facts in these two cases, that, although there are some similar circumstances in them, yet in the most important particulars they are absolutely different. Those which are most strikingly different are as follows:

FIRST.—In the "Silvia" case the glass cover was properly and tightly fastened, and the iron dummy only was left open, while in the present case both covers were left open, or improperly fastened, and there was absolutely nothing to prevent the inflow of water.

SECOND.—On the "Silvia" it was the practice to close the glass port cover only and to leave the dummy open for the purpose of admitting light to the compartment, should it be necessary to get any of the stores contained therein; while on the "Indiana" it was the practice to close both the glass port cover and the iron dummy, and it was the duty of at least three officers to see that both were properly fastened.

THIRD.—In the "Silvia" case the officers were aware that the iron dummy was not closed, as it was designedly left open for the purpose of admitting light, while in the present case the covers were unintentionally and negligently left open or unfastened and were supposed to be closed.

FOURTH.—In the case of the "Silvia" the glass port cover was sufficient protection against the influx of water, as the port was water tight, while in the case of the "Indiana" there was absolutely

nothing to prevent the influx of water, under ordinary conditions, the open port being only between two and three feet above the water line, in a position where it would be submerged by the first moderate sea.

FIFTH.—In the case of the "Silvia" the compartment was not used for cargo, but contained ship stores, while in the present case the compartment was used as a cargo hold exclusively.

The second ground upon which the petitioner relies is that set forth in the dissenting opinion of GRAY, J., in the Circuit Court of Appeals, as follows:

> "If the ship when she left port was not defective in *structure or equipment*, she was, within every reasonable definition of the term, seaworthy."

Or, as stated in the petitioners' brief, it is the difference between the *lack* of proper equipment and the *misuse* of it, by the crew of the vessel or other agents of the owner.

It is there contended that there is no liability for the misuse of proper equipment, either *before* or *after* the commencement of the voyage, because it is an error in "management," and that the Harter Act does not require "due diligence" on the part of what are there called the sea agents of the owner *to make the vessel seaworthy*, but merely requires "due diligence" on the part of the owner *in their selection.*

Although that question has never been directly passed upon by this court, it may be fairly said that the law is now well settled that the ship owner does not use "due diligence" to make the vessel seaworthy, within the meaning of Section 3 of the Harter Act, by merely furnishing proper equipment;

the law requires "due diligence" also on the part of his servants, in the use of the equipment, before the commencement of the voyage.

The question came before the Court of Appeals, in *Dobell* v. *Steamship Rossmore Co.*, L. R. (1895) 2 Q. B., 408.

The "Rossmore" left Baltimore with a port improperly caulked, through the negligence of the carpenter. Sea water entered through this port and damaged the cargo. She was admitted to be unseaworthy by reason of the condition of the port.

The Harter Act was included in the bill of lading, and the question arose whether the owners had exercised "due diligence," required by the Act, in personally furnishing a proper covering for the port and in employing competent servants. It was held that they had not, *as the Act required*, "*due diligence*" *on the part of the servants and agents of the owner, as well as on his part personally.*

The only decision suggesting a different view is that of Judge BROWN, of the Southern District of New York, in the "Silvia," 64 Fed., 608. He there says:

> "By the supply of proper ports, proper glasses and proper iron covers for the ports, as in the supply of proper hatch covers, the owner's duty of 'due diligence' was fulfilled, and if the officers of the ship, either at the moment of sailing or afterwards, omit to make use of the things supplied to put or keep the ship in a proper seaworthy condition for meeting the perils of the sea from time to time, such an omission seems to me purely a fault in the navigation or management of the vessel."

Since that decision, Judge BROWN has, however, himself changed his views and has repeatedly held

that the act requires due diligence on the part of the agents of the owner, as well as the owner himself. In other words, that it requires *due diligence in the work itself.*

The "Mary L. Peters," 68 Fed., 919;
The "Flamborough," 69 Fed., 470;
The "Alvena," 74 Fed., 252;
The "Colina," 82 Fed., 665.

Bearing in mind this principle, that the law requires "due diligence" to make the vessel seaworthy, not only on the part of the owner, but also on the part of his servants, it is manifest that the misuse of equipment may in some cases create unseaworthiness. Where the misuse occurs during the voyage, it is clearly an error in "management" and the ship is not liable.

The "Silvia," *supra.*

But where the misuse occurs *before* the commencement of the voyage, it may create initial unseaworthiness.

Seaworthiness means no more than that the vessel is in a certain condition.

As expressed by Mr. Justice GRAY, in the "Silvia," *supra*,

> "The test is whether the vessel *is reasonably fit to carry the cargo* which she has undertaken to transport. This is the commonly accepted definition of seaworthiness."

Whether the misuse of equipment before the commencement of the voyage creates unseaworthiness, depends entirely upon the resulting condition of the ship, i. e., whether it renders the ship unfit to carry the cargo.

But, while negligence in the use of equipment

before the commencement of the voyage *may* create unseaworthiness, it is frankly admitted that every failure to properly use it, before the ship breaks ground, does not create initial unseaworthiness. This is evident from the meaning of seaworthiness —fitness for the voyage. Obviously not every failure to use the proper appliances renders the vessel unfit. There are many parts of the ship which, in ordinary practice, are so used as not to be adequate for all occasions, yet whilst the safety of cargo may be diminished thereby, it cannot be fairly said that the ship is made unfit to carry the cargo.

Every vessel has some ports which in ordinary practice are left open, and although the failure to close them upon the approach of a storm, during the voyage, may be negligence, it certainly is not sufficient to make the vessel unseaworthy. If such a rule were applied, every vessel sailing the ocean would be unseaworthy.

The cases of hatch coverings and anchors referred to in the dissenting opinion of GRAY, J., clearly fall within this class, and would not create initial unseaworthiness.

Headley v. *Pinkney & Sons, S. S. Co.*, Appeal Cases (1894) 222, also falls into this class. In delivering the opinion, Lord Hershell said :

"The failure properly to secure many ports of the ship *which are, in ordinary practice, open from time to time*, would, no doubt, diminish the safety of those serving on board her, and be a source of danger to them ; but I do not think it could reasonably be said that because in such a case a bolt was not securely fixed, the vessel thereupon became unseaworthy."

It is unnecessary to seek further for an illustration of this class of cases than the "Silvia" itself. Mr. Justice GRAY says in the opinion (p. 465):

"The ports were in a place where these shutters *would usually be left open* for the admission of light."

How different are the facts of the present case. Not only was it not the practice to leave the port covers open, but being in a position where the port would probably be submerged in ordinary seas, common prudence required that not only the glass cover should be closed, but the iron dummy as well.

The importance of the careful closing and fastening of the port covers will be appreciated when it is remembered that there was imposed upon three different officers of the vessel, the duty of seeing that they were properly made fast.

The question in this case is one of fact; whether the steamship "Indiana" was in a seaworthy condition when she left Liverpool.

The port covers of a port, opening into a cargo hold, only two or three feet above the water line and likely to be submerged by the first moderate sea, were either open or insecurely fastened. They were not left open in ordinary practice, but were supposed by the officers to be properly closed; the hatches were battened down with them in that condition, and no one on board had the slightest intention of giving them the slightest care during the voyage.

That the vessel was not then seaworthy—that is, reasonably fit to carry the cargo—does not seem to admit of any doubt.

Nor does there appear to have been the great

conflict of opinion in the courts below upon this question of fact.

The learned Judge of District Court was clearly of opinion that the "Indiana" was unseaworthy, but yielded to what he deemed the binding decision in the case of the "Silvia." Entertaining so pronounced a view as to the unseaworthiness of the "Indiana," as his two opinions show, it may be safely said that if counsel had then had access to the record in the "Silvia" case, and could have presented to him the same analysis and comparison of the two cases which was afterwards presented to the Court of Appeals, that he would have reached the same conclusion as the majority of that Court, and have held that the facts in the "Silvia" case were so different that it was not a binding decision in this case.

The distinction between the two cases stated in the dissenting opinion of GRAY, J., viz., that in the "Silvia" the iron cover was left open, while in this case the glass cover was also open, is in itself sufficient to make the difference between seaworthiness and unseaworthiness. In the first instance the glass cover was sufficient to resist all ordinary seas, while in the latter there was not the slightest protection against even ordinary seas.

But it is submitted that it cannot be properly said that this was the *only* distinction, as stated in his dissenting opinion.

There were the additional circumstances, that in the "Silvia" the port was a considerable distance above the water; it was the practice to have the iron dummy open to admit light to the compartment;

it was left open intentionally; it was known by the officers to be open, &c., while in this case, the port was only two or three feet above the water line; it was the practice to close both the glass cover and the iron dummy; they were supposed to be properly closed and the hatches were battened down, with both covers insecurely fastened and with no thought on the part of the officers to give them any attention during the voyage.

Seaworthiness is a condition produced by a number of different circumstances, and its existence or non-existence can only be determined after a consideration of all the facts.

As said by Lord BLACKBURN in *Steele* v. *State Line S. S. Co.*, 3 App. Cases, 72:

"It will be a question, **taking the whole circumstances together**, was this ship reasonably fit to encounter the perils and was the damage that happened a consequence of her being unfit, if she was unfit. That question will have to be determined upon **the whole circumstances and the whole evidence.**"

It is submitted that a consideration of all the facts show beyond doubt that the "Indiana" was not seaworthy at the commencement of the voyage, as held by the Court of Appeals, and that a writ of certiorari, as prayed for by the petitioner, should be refused.

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